

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
ASARCO INCORPORATED,

Appellant,

v.

PUGET SOUND AIR POLLUTION
CONTROL AGENCY,

Respondent.

PCHB No. 82-55

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter, the appeal from the assessment of five \$250 civil penalties for the alleged violation of section 9.11(a) of respondent's Regulation I, came before the Pollution Control Hearings Board, David Akana (presiding), Gayle Rothrock, Chairman, and Lawrence J. Faulk, at a formal hearing in Lacey on November 1, 1982.

Respondent was represented by its attorney, Keith D. McGoffin, appellant was represented by its attorney, Michael R. Thorp. Nancy Miller recorded the proceeding.

Having heard the testimony, having examined the exhibits, and

1 having considered the contentions of the parties, the Board makes these

2 FINDINGS OF FACT

3 I

4 Appellant Asarco Incorporated owns and operates a copper smelter
5 near Tacoma, Washington. In connection with its operation, the Tacoma
6 smelter utilizes both electrostatic precipitators and baghouses as
7 part of the pollution control system. The electrostatic precipitators
8 treat gas streams coming from the anode furnace and the reverberatory
9 furnaces while the roaster baghouse treats the gas stream coming from
10 the roasters.

11 II

12 The particulate matter which is collected in both the
13 electrostatic precipitators and the roaster baghouse is in the form of
14 a very fine dust. This dust is removed from the electrostatic
15 precipitators and conveyed to four storage silos. From there the dust
16 can be removed from any one of four storage silos to a pressure pot.
17 From the pressure pot the dust is conveyed through a pneumatic
18 conveying line to the receiving tank.

19 Dust from the roaster baghouse is conveyed to two silos for
20 storage. The dust can be removed from either of the two silos to a
21 pressure pot. From there the dust is conveyed through a pneumatic
22 conveying line to the same receiving tank.

23 Once the dust reaches the receiving tank it is conveyed through a
24 zigzag blender to a holding bin and finally to the arsenic roaster
25 where it is reprocessed

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III

The receiving tank has a capacity of 500 cubic feet. Its purpose is to continuously feed dust to the arsenic roasters. As the dust level falls below two separate level indicators, a signal is sent to a selected pressure pot. A batch of about 60 cubic feet of dust is then sent to the receiving tank. If the level indicators continue to send a signal, another batch is sent. Once either level indicator is topped, no further signals are sent.

The receiving tank is located on the top of the roaster building, adjacent to Ruston Way.

IV

On the evening of January 7, 1982, at about 7:00 p.m., a malfunction took place at the receiving tank. Although the level of dust in the receiving tank exceeded both level indicators, signals were apparently sent to the pressure pot servicing the electrostatic precipitators. Because it was receiving signals from the receiving tank, the pressure pot continued to send dust to the receiving tank. The receiving tank eventually filled up and dust was forced into the baghouse on top of the receiving tank. From there the dust escaped through the baghouse relief vent, piled up on the platform adjacent to the baghouse and eventually spilled off the platform and dropped approximately 100 feet onto Ruston Way.

V

The dust first lightly sprinkled the road. Complainants Leask and Mitchell drove through the dust while on their way to dinner at about

1 6:30 p.m. They did not think to stop at that time.

2 At about 7:00 p.m., complainants Bailey in his car and M.
3 Catalinich and J. Catalinich in their car were covered by large
4 amounts of dust as they drove along Ruston Way under the receiving
5 tank. The dust was very thick at that time and left the occupants
6 coughing, sneezing, and covered with the fine dust.

7 The complainants gathered at the plant office to report their
8 distress.

9 VI

10 At about 7:10 p.m., the plant personnel reported the events to the
11 plant manager who was at home at the time. He instructed the plant
12 personnel to close off Ruston Way to road traffic through the Tacoma
13 Police Department, and to shut off the arsenic plant.

14 Upon arriving at the plant at about 7:15 p.m., the plant manager
15 determined that the complainants were distressed but not in a
16 life-threatening condition. He offered to send the complainants to the
17 hospital. All complainants, including Leask and Mitchell who learned
18 of the spill and called later, were examined at a hospital.

19 Appellant's employees sought to discover the cause of the
20 malfunction.

21 VII

22 At 7:58 p.m., respondent's answering service received a complaint
23 of dust from M. Catalinich. At 8:05 p.m., appellant's employee
24 reported a "broken dust conveyor or line" to respondent. Thereafter,
25 respondent's inspector visited the site and took samples of the dust.

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1 from the Catalinichs' car. Appellant was told that notices of
2 violation would be issued the next day.

3 VIII

4 On January 8, 1982, respondent requested that appellant submit a
5 full report as outlined in section 9.16. On January 14, 1982,
6 respondent received the requested report which met the reporting
7 requirements of the provision. Respondent determined that section
8 9.16 could not be used as a defense by appellant because the pollution
9 event was not reported immediately to the agency.

10 IX

11 Each complainant filed a "formal" complaint with the agency. As a
12 result, the agency issued five notices of violation of section 9.11(a)
13 from which followed five \$250 civil penalties. Each penalty notice
14 alleged that appellant violated section 9.11(a) by: "causing or
15 permitting the emission of an air contaminant . . . that caused
16 detriment to the health, safety or welfare of any person, or caused
17 damage to property or business." Respondent later dropped the
18 allegation relating to the detriment to the health of any person.
19 Damage to business is also not at issue.

20 Respondent would not have issued the five civil penalties had not
21 the five complainants filed their formal complaints with it. Neither
22 would the agency withdraw the penalties

23 X

24 The dust emitted by appellant contained arsenic (48%), lead,
25 cadmium, zinc and other elements.

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XI

Complainants collectively reported coughing, sneezing, metallic acrid taste, burning sensations on the tongue and lips, sore throats, rash, difficulty in breathing, and throat lumps at the time. It is also apparent that they individually suffered varying degrees of mental distress from the physical event and the uncertainty of future impacts upon their health. Complainants' clothes were also contaminated.

Bailey's car and the Leask-Mitchell's car have been junked as a result of the dust spill. The Catalinichs' car is in storage but is no longer wanted by them. Each complainant is concerned about arsenic residue in the car and possible impact on them should they continue to use the car.

XII

Pursuant to RCW 43.21B.260, respondent has filed a certified copy of its Regulation I and amendments thereto which are noticed.

Section 9.11(a) makes it unlawful to cause or permit the emission of any air contaminant if it causes detriment to the health, safety or welfare of any person, or causes damage to property or business

Section 9.11(b) makes clear that the regulation is not intended to impair the legal remedy of any person, or the public, for injury or damage from an air contaminant emission.

Section 9.16 provides:

Emissions exceeding any of the limits established by this Regulation as a direct result of start-ups, periodic shutdown, or unavoidable and unforeseeable (sic) failure or breakdown, or

unavoidable and unforeseeable upset or breakdown of process equipment or control apparatus, shall not be deemed in violation provided the following requirements are met:

(1) The owner or operator of such process or equipment shall immediately notify the Agency of such occurrence, together with the pertinent facts relating thereto regarding nature of problem as well as time, date, duration and anticipated influence on emissions from the source.

(2) The owner or operator shall, upon the request of the Control Officer, submit a full report including the known causes and the preventive measures to be taken to minimize or eliminate a reoccurrence.

Section 3.29 provides for a civil penalty of up to \$250 per day for each violation of Regulation I.

XIII

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings the Board enters these

CONCLUSIONS OF LAW

I

Appellant violated section 9.11(a) on January 7, 1982, by causing detriment to the welfare and property of each complainant. For the reasons set forth in PCHB No. 1116, section 9.11(a) can result in several violations where several persons have suffered a detriment. Accordingly, we conclude that five violations occurred as alleged in three separate automobiles at three separate times.

II

The dust spill on the evening of January 7, 1982, was the direct result of unavoidable and unforeseeable failure or breakdown of

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1 process equipment or control apparatus. Under the press of an
2 emergency, appellant was able to report a breakdown to respondent
3 before respondent's inspector visited the site. The time elapsed from
4 the beginning of the breakdown to the telephone call to respondent,
5 was reasonable in light of the prior investigation needed to make an
6 intelligent report to respondent as provided in section 9.10(1). We
7 conclude that appellant should not be deemed in violation of section
8 9.11(a). Accordingly the five \$250 civil penalties should be vacated.

9 III

10 Appellant's remaining contention is without merit.

11 IV

12 Any Finding of Fact which should be deemed a Conclusion of Law is
13 hereby adopted as such.

14 From these Conclusions the Board enters this
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ORDER

The five \$250 civil penalties (Nos. 5456, 5457, 5458 5459 and 5560) are vacated.

DONE this 6th day of December, 1982.

POLLUTION CONTROL HEARINGS BOARD


DAVID AKANA, Lawyer Member

See Dissenting Opinion
GAYLE ROTHROCK, Chairman


LAWRENCE J. FAULK, Member

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1 DISSENT - GAYLE ROTHROCK

2 I would alter the Conclusions of Law I and II in the following
3 respects.

4 CONCLUSIONS OF LAW I: after the word "alleged" the remainder of
5 that sentence should be highlighted in three separate automobiles at
6 three separate times.

7 CONCLUSION OF LAW II: after the first sentence replace the
8 existing wording with the following

9 In this emergency circumstance appellant belatedly
10 reported a breakdown to respondent more than one hour
11 after the plant manager became aware of the pollution
12 event at ASARCO. The time elapsed from the beginning
13 of the breakdown to the telephone call to respondent
14 was not reasonable. Additionally, the subject tele-
phone call immediately followed that of an affected
person's call to respondent, which call was made from
appellant's guard house. Therefore, appellant is deemed
to be in violation of respondent's Regulation I, Section
9.11(a).

15 Accordingly I would change the Order to read.

16 The five civil penalties are affirmed, however, \$500 (the equiva-
17 lent of two penalties) is suspended.

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21 GAYLE ROTHROCK
22 Chairman
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